

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

SALATHEIEL REZA BROWN,

Defendant-Appellant.

UNPUBLISHED

October 8, 2002

No. 228762

Macomb Circuit Court

LC No. 99-002839-FH

Before: Meter. P.J., and Saad and R.B. Burns*, JJ.

PER CURIAM.

A jury convicted defendant of unarmed robbery, MCL 750.530, and sentenced him to a term of three to fifteen years' imprisonment. He appeals as of right, and we affirm.

Defendant argues that trial counsel was ineffective because he failed to properly prepare this case for trial and because he failed to object to certain evidence and prosecutorial arguments at trial. Because defendant did not raise this issue in a motion for a new trial or evidentiary hearing in the trial court, our review is limited to the existing record. *People v Snider* 239 Mich App 393, 423; 608 NW2d 502 (2000).

To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there was a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnnie Johnson, Jr*, 451 Mich 115, 124; 545 NW2d 637 (1996). The burden is on defendant to produce factual support for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Defendant argues that his attorney was unprepared for trial. We find nothing in the record that supports this assertion. It is apparent that defendant received sufficient notice of his trial dates to be able to timely advise his attorney of any witnesses he wanted to call at trial. Although defendant complains that certain witnesses were not called, he has failed to show that, had those witnesses testified, there is a reasonable probability that the result in this case would have been different. Accordingly, he has not met his burden of proving that counsel was ineffective. *Pickens, supra; Johnson, supra.*

Defendant also claims that his attorney should have done more to use defendant's closed-head injury as a defense at trial. A defendant is entitled to have his counsel prepare, investigate and present all substantial defenses. Where there is a claim that counsel was ineffective for failing to raise a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial. A substantial defense is one that might have made a difference in the trial's outcome. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). This Court is reluctant to substitute its judgment for that of trial counsel in matters of trial strategy and ineffective assistance of counsel will not be found merely because a strategy backfires. *People v Duff*, 165 Mich App 530, 545-546; 419 NW2d 600 (1987).

There is nothing in the record to support defendant's claim that his head injury or mental state would have supported an insanity or related defense. Furthermore, though counsel knew of defendant's closed-head injury before trial, there is simply no evidence regarding defense counsel's investigation or consideration of defendant's injury or mental condition as a possible defense. In the absence of such testimony, we cannot conclude that counsel erred. *People v Rocky*, 237 Mich App 74, 77; 601 NW2d 887 (1999).

Defendant also says that defense counsel was ineffective for not objecting at trial to various evidentiary matters. At trial, the prosecutor presented evidence of both a subsequent and prior attack upon the victim by defendant. Contrary to defendant's assertion, the record shows that defense counsel objected when the prosecutor began to present evidence of the subsequent attack. Moreover, this evidence was admissible as part of the res gestae of the charged crime. The common law continues to recognize that the entire res gestae of a crime may be admitted without regard to MRE 404(b). As our Supreme Court observed in *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996):

"Evidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime."
[Quoting *State v Villavicencio*, 95 Ariz 199, 201; 388 P2d 245 (1964).]

Because the evidence was admissible under the res gestae exception, it was not necessary to evaluate whether it was also admissible under MRE 404(b). *People v Coleman*, 210 Mich App 1, 5; 532 NW2d 885 (1995); *People v Crowell*, 186 Mich App 505, 508; 465 NW2d 10 (1990). Further, both defendant and his mother were properly subject to cross-examination regarding this evidence. Thus, counsel was not ineffective for failing to object on the basis of MRE 404(b).

Defendant also contends that counsel was ineffective for failing to object to the testimony of Detective David Dismuke, wherein Dismuke referred to the subsequent assault of the victim to explain why he was unable to speak to her until about a week after the offense was committed. As discussed above, the evidence of the subsequent attack was admissible as part of the res gestae of this offense. Also, we disagree with defendant's claim that Dismuke's testimony explaining how he learned of the victim's location and condition was inadmissible hearsay. Because the testimony was not offered for the truth of the matter asserted, it was not hearsay. MRE 801(c). Therefore, counsel was not ineffective for failing to object on this basis. See *People v Armstrong*, 175 Mich App 181, 186; 437 NW2d 343 (1989).

Defendant further argues, erroneously, that counsel should have objected to testimony about the victim being hit with a baseball bat, that she required brain surgery, and that she was placed on a ventilator. Defendant contends that this testimony was unduly prejudicial under MRE 403. The probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. MRE 403. "Prejudice inures when marginally probative evidence would be given undue or preemptive weight by the jury." *People v Rice (On Remand)*, 235 Mich App 429, 441; 597 NW2d 843 (1999). Defense counsel was not ineffective for failing to object to this evidence. *Armstrong, supra*.

We likewise conclude that evidence regarding a prior attack on the victim by defendant was also admissible as part of the res gestae of this offense. *Sholl, supra*. The prior incident explained the circumstances leading up to the charged offense. The time lapse between the events would not foreclose the prosecution from presenting this evidence. See *Crowell, supra* at 508. Thus, counsel was not ineffective for failing to object to this evidence or the prosecutor's mention of it in opening statement.

We agree that defense counsel should have objected to the prosecutor's questions, on cross-examination of defendant, about whether defendant assaulted a Radio Shack manager. This other incident was not related to the charged offense and there is no indication that the evidence was admissible for a proper purpose under MRE 404(b). However, because defendant denied any involvement in that incident, and no other evidence on that matter was presented, we conclude that defendant was not prejudiced by counsel's failure to object. *Pickens, supra*; *Johnson, supra*.

Similarly, we reject defendant's claim that the prosecutor committed misconduct by presenting the above evidence. Prosecutorial misconduct cannot be based on a good faith effort to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999); *People v Missouri*, 100 Mich App 310, 328; 299 NW2d 346 (1980). The prosecutor, as an advocate for the state, is entitled to attempt to introduce evidence which he legitimately believes will be accepted by the court so long as that attempt does not actually prejudice the defendant. *Id.* at 328-329. Because the evidence of the prior and subsequent assaults upon the victim was admissible, the prosecutor did not commit misconduct by presenting such evidence. Further, even if the prosecutor acted improperly by questioning defendant about an assault upon a Radio Shack employee, as discussed above, the questioning did not prejudice defendant.

To the extent defendant requests that we remand this matter for an evidentiary hearing on his claim of ineffective assistance of counsel, we decline to do so. This Court previously denied

defendant's motion to remand and defendant has not offered any additional support for his request. See *People v Simmons*, 140 Mich App 681, 685-686; 364 NW2d 783 (1985).

Finally, we reject defendant's claim that his sentence should be reversed. Defendant was sentenced within the recommended range of the statutory sentencing guidelines. *People v Babcock*, 244 Mich App 64, 70-73; 624 NW2d 479 (2000); *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000).

Affirmed.

/s/ Patrick M. Meter
/s/ Henry William Saad
/s/ Robert B. Burns